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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Constitution, an inferior court of the United States can apply prudential doctrines of justiciability—in this case, prudential "ripeness"—as a basis for refusing to exercise jurisdiction that Congress commanded the inferior court to exercise to ensure prompt, pre-enforcement review of final legislative rules promulgated by a federal agency?

2. Whether this Court's decisions in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and its progeny allow a Court of Appeals to apply prudential doctrines of justiciability—in this case, prudential "ripeness"—to postpone judicial review of final legislative rules promulgated by a federal agency under a congressional statute that requires prompt, pre-enforcement review of such rules by the Court of Appeals based solely upon objections raised in rulemaking comments and the administrative record in existence at the time the rule is promulgated, and that explicitly precludes judicial review of such rules in later enforcement actions?

PARTIES TO THE PROCEEDINGS

The following Petitioners were parties to the proceedings below: Petitioner Appalachian Power Co., *et al.* was petitioner in No. 97-1125. Petitioner Clean Air Implementation Project was petitioner in No. 97-1117. Petitioners American Petroleum Institute and American Forest & Paper Association were petitioners in No. 97-1130. Petitioner Can Manufacturers Institute was petitioner in No. 97-1226. Petitioner Corn Refiners Association, Inc. was petitioner in No. 97-1242. Petitioners Ohio Chamber of Commerce, and Ohio Chemical Council were petitioners in No. 97-1254. Petitioner RSR Corporation was petitioner in No. 97-1261.[1]

Appalachian Power Co., *et al.*[2] is comprised of the following petitioners:

Baltimore Gas and Electric Company
Carolina Power & Light Company
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Power and Light Company
CINergy Corp.
Cleveland Electric Illuminating Company
Columbus Southern Power Company
Commonwealth Edison Company
Consumers Power Company

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[1] A list of parent companies, subsidiaries, and affiliates of Appalachian Power Co., *et al.* and other petitioners is contained in Appendix I to the Petition pursuant to Rule 29 of this Court.

[2] The following petitioners in the D.C. Circuit have withdrawn from the group that comprises Appalachian Power Co., *et al.* for purposes of the petition for certiorari: Centerior Energy Corp.; Consolidated Edison Company of New York, Inc.; Duquesne Light Company; Long Island Lighting Co.; Montaup Electric Company; New England Power Company; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; and PECO Energy Company.

Dayton Power & Light Company, The
Delmarva Power & Light Company
Detroit Edison Company, The
Duke Energy Corporation
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company
(dba Allegheny Power System, Inc.)
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
Pacificorp Electric Operations
Pennsylvania Power & Light Company
Plains Electric Generation & Transmission;
Cooperative, Inc.
Potomac Edison Company, The
(dba Allegheny Power System, Inc.)
Potomac Electric Power Company
Public Service Company of New Mexico
Public Service Company of Oklahoma
Salt River Project
South Carolina Electric & Gas Company
Southern Company, The

Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company

Southwestern Electric Power Company
Tampa Electric Company
Toledo Edison Company
Tucson Electric Power Company
Union Electric Company
Virginia Power
West Penn Power Company
(dba Allegheny Power System, Inc.)
West Texas Utilities Company
Wisconsin Electric Power Company
Edison Electric Institute
National Rural Electric Cooperative Association; and
American Public Power Association

The following were petitioners in the proceedings below and have not joined petitioners seeking a writ of certiorari: American Automobile Manufacturers Association; American Iron & Steel Institute; Association of International Automobile Manufacturers; National Mining Association and Coalition for Clean Air Implementation were petitioners in No. 97-1130; National Environmental Development Association's Clean Air Regulatory Project was petitioner in No. 97-1142; Gas Processors Association was petitioner in No. 97-1169; Specialty Steel Industry of North America and Steel Manufacturers Association were petitioners in Petition No. 97-1173; The Fertilizer Institute was petitioner in No. 97-1179; The Society of the Plastics Industry, Inc. was petitioner in No. 97-1190; Chemical Manufacturers Association was petitioner in No. 97-1195; National Oilseed Processors Association was petitioner in No. 97-1241; Entergy Services, Inc. and Florida Power & Light Company, Inc. were petitioners in No. 97-1253; Corporate Environmental Enforcement Council was petitioner in No. 97-1266; American Portland Cement Alliance was petitioner in No. 97-1269; National Association of Manufacturers was petitioner in No. 97-1273; Lead Industries Association, Inc. was petitioner in No. 97-1278; American Coke & Coal Chemicals Institute was petitioner in No. 97-1281; Missouri Chamber of Commerce was petitioner in No. 97-1282; National Grain & Feed Asso-

ciation was petitioner in No. 97-1283; Electronic Industries Association was petitioner in No. 97-1286; The Aluminum Association was petitioner in No. 97-1289; The Association of Battery Recyclers, Inc. intervened below in petition No. 97-1259.

The United States Environmental Protection Agency (EPA) was Respondent in all of the proceedings, and Natural Resources Defense Council intervened on behalf of Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. ———

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Appalachian Power Company, 57 other individual electric utilities, Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, American Petroleum Institute, American Forest and Paper Association, Can Manufacturers Institute, Clean Air Implementation Project, Corn Refiners Association, Ohio Chamber of Commerce, Ohio Chemical Council and RSR Corporation [1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 14, 1998.

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[1] The Petitioners and their parent companies, subsidiaries, and affiliates are listed in Appendix I to the Petition pursuant to Rule 29 of this Court.

OPINION BELOW

The opinion of the U.S. Court of Appeals in Clean Air Implementation Project, et al. v. Environmental Protection Agency, Nos. 97-1117 et al. (D.C. Cir. August 14, 1998) is reported at 150 F.3d 1200. A copy of the opinion appears in the Appendix (hereafter referred to as "App. ——") at 1a-16a.

JURISDICTION

The opinion of the U.S. Court of Appeals for the D.C. Circuit was entered on August 14, 1998. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 20, 1998. App. 17a-20a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory and regulatory provisions are set forth in the Appendix:

1. U.S. Constitution, Article I, § 8, cl. 9; Article III, § 1 (App. 23a).
2. Clean Air Act §§ 110(a), (c) & (k), 111 (a)-(c), 112(q) and 307(b), (d) & (e) (1994). (App. 24a-52a).
3. 40 CF.R. §§ 51.212, 52.12, 52.33, 60.11 and 61.12 (1997) (as amended by the final legislative rule at issue in this case), and 40 C.F.R. § 60.11 (1996) (prior to promulgation of the rule) (App. 53a-67a).

STATEMENT OF THE CASE

Legislative rules issued by administrative agencies provide the foundation for modern regulatory programs. They have binding future effect on the regulator, the regulated, and the courts. Because of the importance of legislative rules to the integrity of the regulatory programs they shape, and their coercive effects on future conduct, Con-

gress has embraced a policy of repose in many modern regulatory statutes requiring those adversely affected by legislative rules to seek circuit court review promptly after rules are promulgated and prior to their application in individual cases.

This case involves such a statute and presents the question whether the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has the authority to apply doctrines of judicial efficiency—in this case the doctrine of "prudential ripeness"—to defeat the prompt judicial review of legislative rules commanded by Congress under § 307(b) of the Clean Air Act ("CAA" or "Act").[2] Section 307(b)(1) grants the D.C. Circuit exclusive jurisdiction to review "nationally applicable" regulations promulgated by the U.S. Environmental Protection Agency ("EPA" or "Agency") and directs that such review occur promptly (i.e., a petition for review must be filed within 60 days of publication in the *Federal Register*), and thereafter forecloses any challenge to the rules in any proceeding to apply or enforce them.

In this case, hundreds of companies and trade associations representing virtually every industry in the country filed timely petitions in the D.C. Circuit to review legislative rules adopted by EPA under the Clean Air Act. The challenged regulations affect literally thousands of emission standards adopted by EPA and the states over the previous 25 years. Despite the clear congressional directive for prompt judicial review set forth in § 307(b)(1), the D.C. Circuit dismissed all petitions without resolving any of Petitioners' facial challenges to the new rule. The sole basis for the D.C. Circuit's refusal to exercise its judicial review responsibilities under § 307 is this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (hereinafter "*Abbott Labs*") and its progeny.

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[2] 42 U.S.C. § 7401 *et seq.* (1994) (hereinafter citations will be to the Act itself unless otherwise noted).

A. The Constitutional and Statutory Context of This Case

Article III, Section 1 of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." App. 23a. Article I, Section 8, Clause 9 provides, in turn, that "Congress shall have Power . . . [t]o constitute Tribunals inferior to the Supreme Court." App. 23a. In accordance with these constitutional provisions, federal courts have long recognized that the scope of "inferior" court jurisdiction, including that of the Courts of Appeals, "is constitutionally committed to the discretion of Congress." [3]

Exercising its constitutional authority, Congress established the Courts of Appeals and vested them with exclusive jurisdiction to review final legislative rules or orders under various regulatory statutes.[4] One such provision is § 307 of the Clean Air Act. App. 44a-52a. CAA § 307(b)(1) requires pre-enforcement judicial review of final legislative rules promulgated by EPA under the Act, with strict limits on both the timing and the record for review. Any nationally applicable final legislative rules promulgated by the EPA Administrator are subject to review *only* in the D.C. Circuit. To obtain review, a petition for review *must* be filed within sixty days after notice of the final rule appears in the *Federal Register*.[5]

Under § 307(d)(7), the record for review of a final rule consists *exclusively* of material in the rulemaking record. Consistent with that provision, § 307(d)(6)(C)

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[3] *See Bensalem Tp. v. American Fidelity Fire Ins. Co.*, 644 F.2d 990, 994, n.6 (3rd Cir. 1981).

[4] *See infra* notes 18-27 and accompanying text.

[5] Although § 307(b)(1) provides for limited post-60 day review, such a challenge can be heard only if based *"solely* on grounds arising after" the 60-day period and only if the petition for review is filed within 60 days after those grounds arise. (Emphasis added).

provides that legislative rules subject to review under § 307 "may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of . . . promulgation" of such rules. Moreover, under § 307(d)(7)(B), only objections raised with "reasonable specificity" during the rulemaking may be raised during judicial review. Finally, in § 307(b)(2), Congress determined that agency rules that are subject to judicial review under § 307(b)(1) *are not* subject to judicial review in enforcement proceedings.

The legislative history of § 307 explains why Congress mandated expeditious, pre-enforcement review of legislative rules adopted by EPA under the Act. According to the Senate Committee Report which accompanied the original version of § 307 (the House had no comparable provision), "the integrity of the time sequences provided throughout the Act" required that "[a]dministratively developed standards, rules and regulations under the Act" be subject to judicial review "within controlled time periods." App. 68a-69a.[6] Congress intended therefore that "the adequacy of a promulgation of any standard or regulation" would be "measure[d] . . . by the information *available at the time of such promulgation.*" App. 70a (emphasis added).

In 1977, Congress extended the deadline for filing judicial review petitions from 30 to 60 days, expanded the jurisdiction of Courts of Appeals to review all final agency actions (thereby displacing previous district court review of certain final actions),[7] and incorporated mandatory requirements for developing a rulemaking record upon which judicial review must occur. With respect to

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[6] *See also Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849, n.15 (D.C. Cir. 1972) ("Congress was significantly concerned with expedition" of judicial review to assure that implementation of the Act's requirements "would not be needlessly delayed by litigation in the courts.").

[7] *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980).

the extension of the filing period, the House Committee Report underlying the 1977 amendments (there was no comparable Senate provision) explained that

> [i]n extending to 60 days the time within which a party may file a petition for review of certain EPA actions, the committee wishes to reaffirm its intent *to strictly limit section 307 challenges to those which are actually filed within that time.* . . . [U]nless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, *the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.*[8]

The House Committee Report explained that the objective of the administrative record requirements in § 307(d) was "to permit any court reviewing the rule under section 307(b) to be fairly apprised of the basis for the Administrator's action." App. 77a. Finally, reinforcing that Congress intended strict adherence to the petitioning deadline, the Senate Committee specifically *rejected* recommendations made by the Administrative Conference of the United States[9] that would have allowed the legality of rules subject to judicial review under § 307(b) to be tested in enforcement proceedings. App. 81a.

In short, Congress mandated expeditious, pre-enforcement review of final legislative rules promulgated by EPA under the Act based on whatever administrative record EPA had developed in support of the rule. Congress reinforced the mandatory regime of prompt, pre-enforcement review by explicitly barring review of those rules in enforcement proceeding. Congress contemplated later judicial review of such rules by circuit courts only where significant new and different information presented new grounds upon which to challenge the rule, and then only

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[8] App. 77a-78a (emphasis added).

[9] *See* 5 U.S.C. §§ 571-576 (1976).

within a short period after the new grounds arise. *Supra* note 5.

B. EPA's Credible Evidence Rule

The regulations at issue in this case arise under the Act, which establishes a comprehensive program for the regulation of air pollutants. With respect to stationary sources of pollution, the Act divides responsibility for regulation between the federal government and the states.

In §§ 108 and 109, Congress required EPA to set "national ambient air quality standards" ("NAAQS") to protect public health and welfare. Congress then called upon the states to take the lead in setting emission standards to achieve the NAAQS. Under § 110, each state must adopt a "state implementation plan" ("SIP") that specifices the control measures needed to attain and maintain the NAAQS, and where a state fails to adopt an appropriate SIP, EPA must develop a "federal implementation plan" ("FIP").

In addition to requiring states to develop SIPs, the Act since 1970 has required that EPA promulgate, under § 111, Federal "new source performance standards" ("NSPS") for significant new stationary sources of air pollution and promulgate, under § 112, "national emission standards for hazardous air pollutants" ("NESHAP") that apply to both new and existing sources. These emission standards, like all stationary source emission standards established under the Act, have two components: (1) a numerical emission limit on the pollutants that may be released; and (2) a test method for measuring compliance with that limit. The criteria for establishing and revising SIP, NSPS, and NESHAP standards are set out in §§ 110, 111, and 112 of the Act. App. 23a-43a.

On February 24, 1997, EPA issued what is known as the "credible evidence" ("CE") rule. 62 Fed. Reg. 8314 (1997). This final legislative rule fundamentally changed the way in which NSPS and NESHAP standards are implemented under the Act. Prior to the CE rule, prescribed reference test methods for measuring regulated emissions

were the *exclusive* means for determining threshold compliance and civil and criminal liability for violations of the NSPS and NESHAP standards. For example, before the CE rule, EPA's regulations provided that, in the case of NSPS, "[*c*]*ompliance with standards* in this part . . . *shall only be determined by performance tests established in § 60.8, unless otherwise specified in the applicable standard.*" App. 55a (emphasis added).

The CE rule changed this regulatory regime in two fundamental ways. First, EPA deleted regulatory language (i.e., the word "only") that expressly prohibited use of anything other than the specified compliance test method to measure compliance with the standards. App. 55a; 60a. Second, EPA added essentially the same language to five sets of regulations promulgated by EPA to implement NSPS, NESHAP and SIP requirements.[10]

This new regulatory language authorizes use of test methods or other evidence to measure compliance with federal and SIP emission standards even though those methods or evidence were not evaluated when the standards were originally developed (e.g., authorizing use of short term data from continuous emission monitors (CEMs) operating all the time to enforce standards that were based on a limited number of short-term stack tests conducted under controlled operating conditions). *See* 62 Fed. Reg. at 8319 (data from CEMs and continuous opacity monitors (COMs) are credible evidence for purposes of standards that were developed, and previously enforceable, using data only from periodic reference methods.) By expanding the evidence that can be used to show civil or criminal violations of standards under the Act, EPA fundamentally changed an essential component

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[10] The new language provides that nothing in the regulations, *as revised*, "shall preclude the use, including the exclusive use, of any credible evidence information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed." *See* App. 53a-55a; 65a-67a.

of emissions standards promulgated by the Agency and the states over more than 25 years.

Each of these revisions is a final legislative rule with immediate effect and, absent new rulemaking, is binding for the future on EPA, the states, courts, and affected parties.[11] In the preamble to the CE rule, EPA indicated that the new regulations would have immediate and unqualified effect, noting that "[t]oday's *final action* promulgates revisions to *existing* regulations, and are *not* contingent upon future promulgation[s] . . . ." 62 Fed. Reg. at 8322 (emphasis added and in original).

Under the plain terms of § 307(b) each of the regulations revised as part of the CE rule is subject to the judicial review requirements established by that provision. In addition, the revisions to Parts 52, 60 and 61 are also subject to the corollary administrative record requirements established by § 307(d). App. 45a-46a.[12]

C. The Proceedings Below

After EPA promulgated the CE rule, Petitioners challenged it on a variety of legal grounds, based on objections presented during the rulemaking as required by § 307(d)(7)(A)-(B). Among those were: (1) whether the provisions of the Act addressing civil and criminal enforcement authorized EPA to adopt the CE rule; (2) whether EPA was required to conduct rulemakings for each NSPS and NESHAP revised by the CE rule to verify that enforcement of the standards using test methods different from those on which the standards were based would be consistent with the statutory criteria in §§ 111 and 112, respectively; (3) whether EPA unlaw-

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[11] *See, e.g., United States v. Nixon*, 418 U.S. 683, 695 (1974) ("so long as this regulation is extant it has the force of law"); *Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986) (EPA bound to follow own regulations under the CAA).

[12] EPA made a finding, authorized by § 307(d)(1)(V), that the Part 51 CE revision was also subject to § 307(d) rulemaking requirements. 62 Fed. Reg. at 8327.

fully delegated to district courts and administrative judges authority reserved expressly by the Act to the EPA Administrator to establish test methods for compliance with NSPS and NESHAP emission standards; and (4) whether EPA had authority under § 110 to promulgate revisions to 40 C.F.R. Parts 51 and 52 that declare inadequate (and limit the authority and discretion of a state to adopt) any SIP that establishes a specific and exclusive method for determining compliance with emission standards.

Although the CE rule *could impact* the stringency of NSPS or NESHAPS by eliminating exclusive reliance on the test method specified in a standard and authorizing use of other test methods never evaluated by EPA in setting the standard, *supra* 8, Petitioners did not ask the D.C. Circuit to determine, in their facial challenge to the rule, whether the stringency of any particular standard had been changed. Instead, Petitioners asked the Court to determine first, whether the Agency had statutory authority to issue the rule, and second, if so, whether the Agency had complied with applicable legal and procedural requirements of the Act when it promulgated the CE rule.[13]

With respect to the 40 C.F.R. Part 51 and 52 revisions, Petitioners challenged those revisions because they violated the Federal-state division of authority established in CAA § 110 (1) by requiring states to revise SIPs that EPA had previously found were adequate under the § 110 criteria, and that EPA had failed to demonstrate in the CE rulemaking were inadequate under those criteria; and (2) by precluding the states from establishing "exclusive" methods for determining compliance when the federal government had been establishing "exclusive" compliance

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[13] With respect to the NSPS revisions, for example, Petitioners asked the lower court to find that since those revisions might increase the stringency of an NSPS standard that applied to an operating source, and since § 111 precludes application of a more stringent NSPS to sources subject to an existing NSPS, EPA was required to evaluate in a § 111 rulemaking whether the CE rule would make existing NSPS more stringent *before* it adopted the CE rule.

methods for the previous 25 years.[14] Petitioners also challenged the Part 51 and 52 revisions because they directly revised some SIPs and FIPs without EPA having followed statutorily mandated procedures.[15]

D. The D.C. Circuit's Decision

Under Article III, Section 2 of the Constitution, judicial power extends only to "cases or controversies." To determine whether an Article III case or controversy exists, courts look to three general principles: standing, finality, and constitutional ripeness.[16] Separate from these Article III principles, courts also look to a variety of prudential justiciability doctrines as a matter of their own self-governance.[17] One of these doctrines is the prudential ripeness doctrine set forth in *Abbott Labs* and its progeny. The D.C. Circuit's decision relies solely upon the pruden-

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[14] *See supra* 7-8. This Court has held that "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. NRDC*, 421 U.S. 60, 69 (1975).

[15] Separately, dozens of petitions for review have been filed in the D.C. Circuit under the "grounds arising after" provision of § 307(b)(1) challenging *individual* NSPS and NESHAP standards as modified by the CE rule revisions to Part 60/61. Relying upon the D.C. Circuit's decision in this case, EPA recently moved to dismiss each of the pending petitions as prudentially unripe for review. Petitioners in those cases have opposed EPA's motion, arguing that the D.C. Circuit has an obligation under § 307(b)(1) to review the validity of those revised standards. The Part 51/52 revisions contained in the CE rule are not at issue in those petitions challenging individual federal standards, however, and therefore will remain binding legal standards unless and until EPA modifies those standards through new rulemaking.

[16] *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (standing); *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265, n.13 (1991) (ripeness); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (finality).

[17] *See, e.g., Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997).

tial ripeness doctrine as the basis for dismissing the petitions for review in this case.

In its decision, the D.C. Circuit does not dispute that Petitioners had standing to challenge the CE rule (App. 10a, noting that "source owners and operators are . . . under an obligation to comply with EPA's emission standards"), that the "purely legal" questions raised in the challenge were "presumably ripe" for review (App. 11a-12a), or that the CE rule was final agency action (App. 8a-9a). In fact, the D.C. Circuit correctly observed that Petitioners' arguments were "that EPA promulgated the rule without statutory authority, that the revisions are unlawful because EPA failed to comply with proper rulemaking procedures, and that EPA violated the Clean Air Act by forcing states to rewrite their implementation plans." App. 5a. Nevertheless, relying upon this Court's decision in *Abbott Labs*, the D.C. Circuit refused to resolve the legal objections presented to it for review (all of which had been raised during the rulemaking and resolved by EPA) and dismissed each of the 25 petitions for review that had been timely filed challenging the CE rule.

The D.C. Circuit reached this anomalous result because, in the court's view, resolution of each of the legal arguments presented by the Petitioners ultimately turned on whether the CE rule *did in fact* alter the stringency of the NSPS and NESHAP standards. App. 9a-11a. The court explained that "[f]or all we know, application of EPA's credible evidence rule in the place a reference test may potentially affect some standards but not others." App. 10a. Moreover, "[g]iven the universe of all possible evidence that might be considered 'credible,' " the court continued, "it is impossible for us to decide now what impact the rule will have." App. 10a. For this reason, the court ruled that "[a]n enforcement action brought on the basis of credible evidence would . . . provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved." App. 10a.

Regarding Petitioners' challenge to the Part 51 and Part 52 regulations, the D.C. Circuit also found the "challenge unripe." App. 14a. Although acknowledging that "whether EPA had statutory authority" to promulgate the Parts 51 and 52 revisions "is purely a legal one," the D.C. Circuit determined that "the effect of the language in state plans specifying that the use of credible evidence is not precluded—is highly uncertain for reasons already mentioned." App. 15a. For this reason as well, the court held that "our judicial appraisal 'is likely to stand on a much surer footing in the context of a specific application of this regulation.'" App. 15a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit is the pre-eminent circuit court in the field of federal administrative law because it has either concurrent or exclusive jurisdiction to review actions of virtually every federal administrative agency. As a consequence, this Court's seminal decisions governing federal judicial review of administrative actions and the management of such cases in the federal judicial system have sprung from D.C. Circuit. In *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, for example, this Court addressed the scope of relief that could be ordered on remand of a legislative rule. 435 U.S. 519 (1978). Similarly, in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, this Court articulated the standard of review of statutory interpretations supporting legislative rules. 467 U.S. 837 (1984). This case presents yet another opportunity arising from the D.C. Circuit to resolve a fundamental question concerning the management of the federal system of judicial review of administrative action—i.e., whether judicial review of final legislative rules can be denied on the basis of judicial efficiency doctrines despite a clear and unequivocal Congressional command that judicial review of such rules occur promptly.

This case involves more than two dozen petitions for review filed by more than one hundred petitioners representing virtually every industrial sector in the U.S. There

is, and has been, no dispute that the petitions at issue represent legitimate "cases or controversies" or that Petitioners filed timely petitions under § 307(b)(1) triggering the D.C. Circuit's exclusive jurisdiction to review the CE rule. Nonetheless, the D.C. Circuit determined in the decision below that its judgment, not that of Congress, controls when, if at all, Petitioners' legal challenges can be heard.

The Constitution grants to Congress, not the judicial branch, exclusive authority to establish "inferior" courts and to define the jurisdiciton of those courts in whatever fashion Congress deems appropriate. In the exercise of its constitutional authority, Congress saw fit to vest the D.C. Circuit with exclusive jurisdiction to review nationally applicable final legislative rules promulgated by EPA under the Act whenever a petition to review is filed within 60 days of publication of the rule in the *Federal Register*. The grant of this jurisdiction, which is embodied in § 307 (b)(1) of the Act, is without qualification.

This Court has long recognized that lower courts have a "strict duty" to exercise the jurisdiction that is conferred upon them by Congress. Accordingly, where Congress has specifically directed that judicial review occur within a specific time frame and under specified circumstances, this Court has recognized that prudential justiciability doctrines, such as the *Abbott Labs* ripeness doctrine, do *not* apply. The D.C. Circuit's decision contravenes this basic constitutional principle.

Whether the Courts of Appeals can rely upon doctrines of judicial efficiency to defeat clear congressional commands for prompt, pre-enforcement judicial review of regulatory actions has broad implications because Congress has seen fit to vest the Courts of Appeals (and in this case *only* the D.C. Circuit) with exclusive jurisdiction to review administrative actions impacting nearly every facet of modern life. For example, Congress has directed the

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[18] 15 U.S.C. §§ 1193(e), 1474(b), 2060(a) (1994) (Consumer Product Safety Commission rules).

Courts of Appeals to conduct pre-enforcement review of final agency actions arising under consumer product,[18] telecommunications,[19] food, cosmetic and drug,[20] transportation,[21] labor,[22] housing,[23] maritime,[24] agricultural,[25] banking,[26] and a wide array of environmental statutes.[27]

The impacts of the D.C. Circuit's decision are substantial. Petitioners have been denied the opportunity to obtain prompt judicial review of a binding legislative rule adopted by EPA. Petitioners must therefore either conform their behavior to ensure compliance with the standards revised by the CE rule, or risk enforcement action (and costly, continually mounting daily civil penalties, or even *criminal* penalties) for violations based on the revised standards.

By denying Petitioners their right to review in this case, the D.C. Circuit has also established a precedent allowing it and other circuit courts to replace the relatively simple and easily understood processes for judicial review established by Congress with an ill-defined and uncertain review process that will inevitably spawn substan-

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[19] 28 U.S.C. §§ 2342(1), 2344 (1994).

[20] 21 U.S.C. §§ 355(h), 360g, 371(f) (1994) (Food and Drug Administration orders).

[21] 49 U.S.C. § 46110(a) (1994).

[22] 29 U.S.C. § 660(b) (1994) (Occupational Safety and Health Administration rules).

[23] 28 U.S.C. § 2342(6) (1994).

[24] *Id.* § 2342(3)(B) (1994).

[25] *Id.* § 2342(2) (1994).

[26] 12 U.S.C. § 1818(h) (1994).

[27] *See, e.g.*, 15 U.S.C. § 2618(a) (1994) (Toxic Substances Control Act); 30 U.S.C. § 1276(a) (1994) (Surface Mining Control and Reclamation Act); 33 U.S.C. § 1369(b)(1) (Clean Water Act); 42 U.S.C. § 300j-7(a)(2) (Safe Drinking Water Act); *id.* § 4915(a) (1994) (Noise Control Act); *id.* § 6976(a) (1994) (Solid Waste Disposal Act); *id.* § 9613(a) (1994) (Comprehensive Environmental Response, Compensation, and Liability Act); 43 U.S.C. § 1349(c)(3) (1994) (Outer Continental Shelf Lands Act).

tial litigation simply to define its contours. At the very least, by suggesting that review could be relegated to dozens of potential enforcement actions in numerous different district or state courts, the lower court has effectively ensured unnecessary and confusing conflicts between circuits as to the validity of nationally applicable legislative rules.

Only this Court (apart from the D.C. Circuit) is in a position to address this fundamental question because of the unique role of the D.C. Circuit in reviewing final legislative rules of nationwide scope and effect. The normal "conflict of circuit" route for obtaining review by this Court and allowing this Court to manage the direction of judicial trends is not adequate where one circuit court has, as the D.C. Circuit does here, a disproportionate influence on the administration of a particular area of federal law.

In short, review by this Court of the D.C. Circuit decision is warranted for three reasons: (1) to reaffirm the supremacy of duly-enacted congressional law defining the jurisdiction of inferior courts, including the D.C. Circuit, and the obligation of those courts to adhere strictly to the jurisdictional mandates established by Congress; (2) to ensure that this Court's decisions regarding the application of the prudential ripeness doctrine established in *Abbott Labs* and its progeny are not misunderstood as as providing a basis for inferior courts to ignore the supremacy of duly-enacted congressional laws defining their jurisdiction; and (3) to ensure that the prudential ripeness doctrine is not misapplied in numerous other federal regulatory statutes that establish judicial review schemes similar to the one established in CAA § 307.

I. THE D.C. CIRCUIT'S DECISION CONTRAVENES CONGRESS' PLAN FOR JUDICIAL REVIEW.

Section 307(b)(1) of the Act vests exclusive jurisdiction in the D.C. Circuit to review nationally applicable rules under the Act and requires that such review occur if a petition for review has been filed within 60 days of publication in the *Federal Register*. Congress expressly

required such pre-implementation judicial review of legislative rules under the Act to allow the Executive Branch, regulated parties, and others affected by implementation of future binding regulatory requirements to avoid spending resources to conform to the rule before the rule's lawfulness could be tested in court. *Harrison v. PPG Industries*, 446 U.S. at 592.

The D.C. Circuit's decision to postpone review of Petitioners' facial challenges to these rules—challenges that were based on objections raised by Petitioners in rulemaking comments and addressed by the Agency in response to comments—ignores congressional intent in favor of judicial convenience. This the D.C. Circuit simply cannot do.

This Court has long recognized that "the Judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress. . . ." *Cary v. Clarke*, 44 U.S. (3 How.) 236, 245 (1845). Congress possesses "the sole power of creating the tribunals (inferior to the supreme court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to congress may seem proper for the public good." *Id.* Where Congress directs that judicial review occur without consideration of prudential justiciability doctrines, as Congress clearly has the authority to do, those doctrines do not apply.[28]

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[28] *See, e.g., Department of Commerce v. United States House of Representatives*, Nos. 98-404, 98-564, 1999 WL 24616, at *7 (U.S. Jan. 25, 1999) (plain terms of judicial review statute eliminated any prudential ripeness concerns); *Bennett*, 117 S. Ct. at 1161 ("prudential principles . . . can be modified or abrogated by Congress"); *Raines v. Byrd*, 117 S. Ct. 2312, 2318, n.3 (1997) ("Congress' decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any prudential . . . limitations").

Congress exercised its "sole power" to establish the jurisdiction of inferior courts when it enacted § 307 of the Act. This Court has repeatedly made clear that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." [29] As Justice Marshall observed long ago, federal courts "have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given." *Cohens v. Virgina*, 19 U.S. (6 Wheat.) 264, 404 (1821). In at least four ways, however, the D.C. Circuit in this case has "declined" to exercise its jurisdiction contrary to the plain terms of § 307.

First, to ensure expeditious review of final legislative rules, Congress directed that review could be obtained only if a petition for review was filed within 60 days after the rule's promulgation. The plain language of § 307(b) and the relevant legislative history confirms that Congress intended *strict* compliance with the 60 day deadline. *Supra* 4-6. The D.C. Circuit's decision directs, by contrast, that judicial review will commence, if at all, at some undefined date in the future, well beyond the 60 day deadline established by Congress.

Second, Congress directed that judicial review of any final legislative rule subject to § 307(d), which includes the CE rule, must be based on objections contained in the rulemaking "record" and that "[t]he promulgated rule may not be based (in part or whole) on *any* information which has not been placed in the docket *as of the date of such promulgation.*" *Supra* 5. In direct contradiction to this clearly stated limitation, the D.C. Circuit's decision directs that judicial review, if it occurs at all, must occur based on additional "factual development" that, by definition, *cannot* conceivably be part of the

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[29] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). *See also, Bell v. Hood*, 327 U.S. 678, 681-682 (1945) (where a court's jurisdiction has been properly triggered, the court "must entertain the suit").

§ 307(d) administrative "record" on which judicial review must *exclusively* be based.[30]

Third, § 307(b)(1) unequivocally provides that a legal challenge not commenced within 60 days after notice of promulgation of the rule "shall not be subject to judicial review in civil or criminal proceedings for enforcement." App. 45a. Directly contravening this clearly and unequivocally stated congressional intent, the D.C. Circuit's decision suggests that judicial review of the CE rule can occur "in an enforcement action." App. 10a.

Finally, Congress expanded the judicial review responsibilities of circuit courts in 1977 to include all final agency actions. At that time, Congress reaffirmed its intent to control strictly how judicial review would occur under the Act by providing in § 307(e) that "[*n*]*othing in the* [*Act*] *s*hall be construed to authorize judicial review of regulations or orders of the Administrator under [the Act], *except as provided in this section.*" App. 52a (emphasis added). As the foregoing discussion illustrates, the D.C. Circuit has seen fit to ensure that judicial review of the CE rule will be allowed, if at all, in a fashion *inconsistent* with the plain terms of § 307.

Notably, the D.C. Circuit neither acknowledges, nor addresses, the extent to which its decision contravenes the plain terms of § 307. (This may be attributable, at least in part, to the fact that ripeness was not briefed by the parties below.) Instead, the court simply asserts in a conclusory and circular fashion that § 307 does not apply to

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[30] In a similar fashion, this aspect of the D.C. Circuit's decision is also inconsistent with CAA § 307(d)(7)(B). App. 51a. That provision directs that only objections raised with "reasonable specificity during the period for public comment" on the proposed rule can be the subject of judicial review. Whatever the scope or content of objections raised in a subsequent enforcement proceeding, those objections will not, by definition, have been made during the "public comment" period on the proposed rule.

action which the court believes are not prudentially ripe for review.[31]

As noted above, Congress has the "sole power" to determine the jurisdiction and "modes of exercise" of judicial authority by "inferior" courts in the U.S. *Supra* 17. Congress has exercised this authority by enacting § 307 and directing prompt, pre-enforcement review of legislative rules arising under the Act. The D.C. Circuit has a strict duty to exercise its jurisdiction under § 307 (b)(1).[32]

II. THE D.C. CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S APPLICATION OF RIPENESS PRINCIPLES.

This Court's decisions addressing the doctrine of prudential ripeness make clear that the doctrine has no application where Congress has mandated pre-enforcement review of legislative rules. In *Lujan v. National Wildlife Federation*, for example, this Court stated that prudential ripeness considerations *do not* apply "where Congress

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[31] *See* App. 8a (citing *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379 (D.C. Cir. 1996) (hereinafter referred to as "*LEAN*"); *Association of Am. R.R.s. v. Surface Transp. Bd.*, 146 F.3d 942, 946 (D.C. Cir. 1998). Neither of the cited cases supports the D.C. Circuit's interpretation of CAA § 307, however. Unlike Petitioners in this case, for example, the petitioners in *LEAN* were found to lack Article III standing to maintain their action. *LEAN*, 87 F.3d at 1383-1384. Similarly, unlike the legislative rules at issue in this case, the guidelines at issue in *Association of American Railroads* did not create any binding future legal rights or obligations. 146 F.3d at 946-947. Conspicuously absent from the decision is any discussion of the D.C. Circuit's recognition in other cases that "Congress is free to override" prudential justiciability doctrines. *See Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1278 (D.C. Cir. 1994) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

[32] *See, e.g., Harrison v. PPG Indus.*, 446 U.S. at 593 (the responsibility of the courts is to "determine what Congress intended when it vested the courts of appeals with jurisdiction under § 307(b)(1).").

explicitly provides for our correction of the administrative process at a higher level of generality." 497 U.S. 871, 894 (1990). This Court acknowledged that "some statutes permit broad regulations to serve as the . . . object of judicial review directly, even before the concrete effects normally required for APA review are felt." *Id.* at 891. Prudential ripeness considerations can arise only where such provisions are "absent." *Id.*

This Court has repeatedly recognized that provisions like CAA § 307(b) require judicial review "at a higher level of generality." Recently, for example, in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, a decision relied upon by the Court below, App. 11a, this Court unanimously sanctioned application of the prudential ripeness doctrine, but noted specifically that the legal challenge at issue in that case *had not* arisen under a provision like CAA § 307(b)(1) where "Congress has specifically instructed the courts to review [agency rules] 'pre-enforcement.'" 118 S. Ct. 1665, 1672 (1998). Similarly, in *Harrison v. PPG Industries*, this Court indicated that "the basic purpose of § 307(b)(1) [is] to provide prompt, *pre-enforcement* review of EPA action." 446 U.S. at 592 (emphasis added).

Nor are the decisions on which the D.C. Circuit relies to the contrary. As this Court recognized in *Abbott Labs*, the Food, Drug and Cosmetic Act ("FDCA") contained a separate, "special" provision requiring pre-enforcement judicial review under specified circumstances[33] and acknowledged that "when the special provisions apply, pre-

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[33] 387 U.S. at 141. The "special" judicial review provision to which the Court referred in *Abbott Labs* is strikingly similar to CAA § 307(b). It provides that "[i]n a case of actual controversy as to the validity of any order under subsection (e) of this section, any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeals . . . for a judicial review of the such order." 21 U.S.C. § 371(f)(1).

sumably they must be used. . . ." [34] Applying these principles, the Second Circuit, *unlike the D.C. Circuit,* has observed that "decisions like *Abbott Laboratories* have limited relevance . . . [where the underlying statute at issue] specifically authorizes review in the Court of Appeals . . . ." *Ciba-Geigy Corp. v. Sidamon-Eristoff,* 3 F.3d 40, 46 (2d Cir. 1993).

One practical consequence of the D.C. Circuit's misapplication of *Abbott Labs* is to preclude altogether Petitioner's right to seek judicial review of the Part 51 revisions that set forth binding standards for SIP development. Requiring Petitioners to wait until action on a particular SIP to raise their challenges to Part 51 postpones review to a point where the issue may become moot. Once a state revises its SIP to conform to the CE rule and thereafter submits it to EPA for approval, EPA can argue that it is bound to approve it under the reasoning in *Union Electric Co. v. EPA,*[35] despite Petitioners' argument that it is more stringent than necessary to meet § 110.

The only explanation for the D.C. Circuit's decision may be that the D.C. Circuit viewed, as mere dicta, this Court's statement in *Abbott Labs* that lower courts "presumably" cannot defer judicial review under statutes like § 307(b)(1). In fact, as this Court has recognized in other contexts, the requirement that lower courts exercise their jurisdiction in accordance with relevant statutory provisions enacted by Congress is not merely "presumed," but constitutionally required. This Court needs to make

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[34] *Id.* at 146. Subsequent to the *Abbott Labs* decision, the D.C. Circuit observed, in construing the FDCA's pre-enforcement review provision, that "when Congress has specified a procedure for judicial review of administrative action, *that procedure is the exclusive means of review . . . .*" *Independent Cosmetic Mfrs. and Distribs., Inc. v. United States Dep't of H.E.W.,* 574 F.2d 553, 554 (D.C. Cir. 1978) (emphasis added).

[35] 427 U.S. 246, 264-265 (1976) (Administrator has no basis to object to SIP that is more stringent than minimum requirements of Federal law, as long as it meets the minimum criteria).

clear that its decision in *Abbott Labs* does not alter this fundamental constitutional principle and that the prudential ripeness doctrine has no application in cases arising under statutory provisions such as § 307(b) where Congress mandated prompt, pre-enforcement review of the final legislative rules promulgated by EPA.

III. THE D.C. CIRCUIT'S DECISION ESTABLISHES A DANGEROUS PRECEDENT FOR OTHER CIRCUIT COURTS WITH JURISDICTION TO CONDUCT PRE-ENFORCEMENT JUDICIAL REVIEW OF FINAL LEGISLATIVE RULES AND CREATES HAVOC FOR REGULATORY AGENCIES, REGULATED ENTITIES AND THE PUBLIC AT LARGE.

For those subject to the D.C. Circuit's exclusive jurisdiction and those seeking review in circuits that may follow the D.C. Circuit's precedent in this case, the D.C. Circuit's opinion creates uncertainty about their right to challenge the legality of newly promulgated legislative rules that establish binding generic requirements governing the course of future administrative and enforcement proceedings. At the same time, regulatory authorities will remain uncertain about the legality of the regulatory programs governed by such rules, long after Congress intended such uncertainty to have been resolved by a circuit court on review.

The D.C. Circuit's decision replaces the simple and easily understood review process established by Congress with an exceedingly complex review process the most obvious effect of which will be to ensure that the federal circuit and district courts remain busy deciphering its implications.[36] One need merely begin with the simple questions of "when," "who," "what" and "how" as pertains to the D.C. Circuit's views on judicial review to get

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[36] If the D.C. Circuit finds it "impossible . . . to decide now what impact the rule will have," *see* App. 10a, how can those against whom the rule will be applied possibly "know" how their compliance obligations will be determined? This is one of the purely legal issues the D.C. Circuit refused to resolve despite the clear directive for such resolution under § 307(b).

a sense of the complexities spawned by the D.C. Circuit's decision.

The D.C. Circuit has determined that the legal issues presented by Petitioners in this case could be more readily resolved at the time of enforcement. App. 10a. When does the rule, however, become "ripe" for review? Is it when the target first learns that EPA is considering initiation of an enforcement action? Or should the target wait for the Justice Department to seek a criminal indictment? Or must the target await a criminal conviction or imposition of a penalty in a civil or administrative enforcement action?

Assuming a target can determine "when" a challenge becomes ripe, "who" must resolve the challenge? Must the target initiate a circuit court challenge to the CE rule, or a challenge to the SIP or NSPS or NESHAP emission standard being enforced? If so, which Court of Appeals? The circuit court in which the target of the enforcement action resides? The D.C. Circuit? Or should the challenge be resolved by an administrative law judge employed by EPA in an administrative enforcement action? A district court before which an enforcement action has been commenced? A state agency issuing a Clean Air Act operating permit or a state court?

And even if the questions "when" the proceeding should commence and "who" should hear it are resolved, a similar litany of questions applies to "what" must be the subject of judicial review. Is it the § 307(d) administrative docket for the CE rule only? Is it the same docket supplemented by the proceedings of an administrative adjudication? Supplemented by the proceeding of a district court action?

Finally, even if the "when," "who" and "what" of judicial review subsequent to the D.C. Circuit's decision can be resolved, the question of "how" it will be resolved would still remain. Enforcement actions differ by their very nature from one "target" to another. Whatever the

appropriate forum for review, that forum might determine that reliance upon "credible evidence" pertaining to compliance with a particular NSPS did not trigger an obligation by the Agency to commence a rulemaking to revise that NSPS under § 111 and § 307(d) because the application of the CE rule to that NSPS did not change its "stringency." [37] In a subsequent action, however, involving a different NSPS, the court might conclude that reliance upon the CE rule would, in fact, change the stringency of that NSPS. What then? Would it mean that EPA should have initiated the § 111/§ 307(d) rulemaking as originally asserted by Petitioners in this case before promulgating the CE rule? Or, would such a finding mean only that the credible evidence rule is invalid as applied to that NSPS, opening up "invalid as applied" defenses in district courts to any rule or standard being enforced under the Act?

In short, all of these questions arise from the D.C. Circuit's decision, but none of them is answered. However, none of these complexities arises if the D.C. Circuit did what it is already obligated to do—namely, comply with the will of Congress. All that Petitioners ask, and all that Congress commanded, is that the D.C. Circuit reject or accept, *but in all cases resolve*, timely legal challenges made to final legislative rules under the Clean Air Act and similar statutes. The alternative—forcing an already overburdened federal judiciary to address, on a case-by-case basis, questions of the sort enumerated above in order to invent a new judicial review system under the Act and potentially many other regulatory programs with similar judicial review regimes—is neither lawful, nor a wise use of judicial resources.

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[37] The D.C. Circuit observed in its decision that if "the rule does not change the standards, then it might be seen as a permissible exercise of the agency's general rulemaking authority under § 301 of the Act." App. 12a n.5.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the D.C. Circuit should be granted.

Respectfully submitted on behalf of all Petitioners,

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